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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANK G. GUTIERREZ Defendant and Appellant.	B289972 (Los Angeles County Super. Ct. No. MA070211)

APPEAL from the judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Reversed and remanded with directions.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

On April 19, 2017, the appellant Frank G. Gutierrez (hereinafter Appellant) was convicted by plea in the Riverside County Superior Court, case No. RIF1606187, of: 1) evading arrest, in violation of Vehicle Code section 2800.2; and 2) possession of a controlled substance, in violation of Health and Safety Code section 11378; the latter was deemed the principal term. He was sentenced to prison in the Riverside County case for eight years, which included two years for possession of a controlled substance and an additional six years for two 3-year enhancements pursuant to Health and Safety Code section 11370.2, subdivision (c). The Riverside County Superior Court also imposed a concurrent 16-month term for Appellant's evasion of arrest.

Nearly a year later, on March 22, 2018, while Appellant was serving the sentence imposed by the Riverside County Superior Court, he was charged by information in Los Angeles County with: 1) selling, offering to sell, and/or transporting a controlled substance, in violation of Health and Safety Code section 11379, subdivision (a) (hereinafter count one); and 2) possession of a controlled substance for sale, in violation of Health and Safety Code section 11378 (hereinafter count two). It was further alleged that Appellant had suffered seven prior convictions within the meaning of Penal Code section 667.5, subdivision (b).[1] The information also alleged that Appellant had a prior serious and/or violent felony conviction within the meaning of section 667, subdivision (d), and section 1170.12,

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[1] All further statutory references are to the Penal Code, unless otherwise stated.

subdivision (b), and that Appellant was thus subject to sentencing pursuant to section 667, subdivisions (b)-(j), and section 1170.12.

Appellant entered into a negotiated disposition wherein he pled no contest to count one, and admitted he had one prior prison term within the meaning of section 667.5, subdivision (b). In exchange, Appellant was to be sentenced to one year on count one (one-third the middle base term, consecutive to the Riverside case) and an additional consecutive one year for the prior conviction pursuant to section 667.5, subdivision (b). The court dismissed the remaining counts and allegations.

During the sentencing hearing in the Los Angeles County case on April 19, 2018, Appellant requested that the court "strike the priors on his Riverside case, because they're no longer valid" as a result of "the change in the law."[2] Appellant believed the court "ha[d] jurisdiction" to do so. The court, however, stated that "it's a done deal" and that it will not get "involved in a case that's not an L.A. County case." The court denied the request and stated that it will "handle the case that's before [the court], which is the negotiated disposition that [was] agreed upon." Appellant was sentenced to two years "consecutive to any other time." The court indicated Appellant was "to get zero credits because he's currently a sentenced prisoner."

Appellant timely appealed.

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[2] The "change in the law" that Appellant is referring to is Senate Bill No. 180 (hereinafter SB 180), which came into effect as of January 1, 2018.

DISCUSSION

Appellant appeals the trial court's judgment of conviction and sentence, alleging the following: (1) the trial court erred when it failed to impose a single aggregate sentence for Appellant's Riverside County and Los Angeles County judgments; (2) Appellant's Riverside County judgment is entitled to the retroactive effect of SB 180; and (3) the trial court erred when it failed to calculate custody credits due Appellant and failed to include same in the abstract of judgment. We disagree with Appellant's second contention; but agree with his first and third contentions, and reverse and remand with directions.

A. THE TRIAL COURT ERRED IN FAILING TO PRONOUNCE A SINGLE AGGREGATE TERM FOR THE LOS ANGELES COUNTY AND RIVERSIDE COUNTY CASES.

Appellant contends that the trial court erred by failing to pronounce a single aggregate term for Appellant's Riverside County case and his Los Angeles County case. The People agree and so do we.

Section 1170.1, subdivision (a), provides, in relevant part: "[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior

prison terms, and Section 12022.1."[3] California Rules of Court, rule 4.452—which implements section 1170.1, subdivision (a)—instructs, in relevant part: "If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, *the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences*. In those situations: [¶] (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case. [¶] (2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a). . . ." (Cal. Rules of Court, rule 4.452, italics added.)[4]

Here, Appellant was "convicted of two or more felonies . . . in different proceedings or courts," i.e., the Riverside Superior Court and Los Angeles Superior Court, and a "consecutive term of imprisonment [was] imposed" by the Los Angeles Superior

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[3] Section 1170.1, subd. (a) further provides: "The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. . . ."

[4] All references to "rules" are to the California Rules of Court unless noted otherwise.

Court (§ 1170.1, subd. (a)); thus, the trial court "was obligated . . . to promptly recalculate [Appellant]'s sentence . . . and aggregate the prison term to be imposed in the [Los Angeles County] case with the recalculated prison term in the [Riverside County] case." (*People v. Williams* (2007) 156 Cal.App.4th 898, 907, fn. omitted.) But the court failed to pronounce a single aggregate term that included the prior determinate sentence from the Riverside County case, as required by section 1170.1, subdivision (a). The trial court's failure to do so was error, and resulted in an "unauthorized sentence." (*People v. Williams*, *supra*, at p. 907.)

Accordingly, this case must be remanded to the trial court for resentencing, with instructions to impose a single aggregate term. The court should also provide an abstract of judgment reflecting the corrected sentence. (*People v. Montalvo* (1982) 128 Cal.App.3d 57, 64.)

B. SB 180 CANNOT APPLY TO THE RIVERSIDE COUNTY JUDGMENT BECAUSE IT WAS "FINAL" BEFORE SB 180 TOOK EFFECT.

Appellant argues that he is entitled to the retroactive benefit of SB 180, as it pertains to his Riverside County judgment because he was "resentenced" in both cases by the Los Angeles Superior Court. Appellant contends the Los Angeles Superior Court therefore had "the authority and jurisdiction to strike the two three-year section 11370.2, subdivision (c) enhancements imposed by the trial court in the Riverside case" due to the change in the law brought about by SB 180. We disagree.

We review the retroactive application of a statute de novo. (*People v. Grzymski* (2018) 28 Cal.App.5th 799, 805; *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.)

Effective January 1, 2018, SB 180 "narrows and limits the scope of [Health and Safety Code] section 11370.2 enhancements only to prior convictions for sales of narcotics involving a minor in violation of section 11380." (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213, review granted Nov. 20, 2018, S251333 (*McKenzie*); see also Stats. 2017, ch. 677, § 1.) Thus, SB 180 abolished the former Health and Safety Code section 11370.2, subdivision (c) sentence enhancements; however, SB 180 is retroactive, meaning that it "applies retroactively to cases in which the judgment was not yet final on January 1, 2018," when SB 180 took effect. (*McKenzie*, *supra*, at p. 1213; see *People v. Grzymski*, *supra*, 28 Cal.App.5th at pp. 804–805.) "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323.)

Typically, "[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired." (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.) "In a criminal case, judgment is rendered when the trial court orally pronounces a sentence." (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9.) As the Fifth District recently explained in *McKenzie*, "In a criminal case, the *sentence* is the judgment. (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 . . . [' "A 'sentence' is the judgment in a criminal action [citations]; it is the declaration to the defendant of his disposition or punishment once his criminal guilt has been ascertained." '].) When probation is granted, however, the timing of the judgment

can vary . . . ." (*McKenzie*, *supra*, 25 Cal.App.5th at pp. 1213–1214, review granted.)[5]

During the conviction and sentencing hearing on April 19, 2017 in the Riverside County case, the Riverside County Superior Court sentenced Appellant to two 3-year enhancement terms for each qualifying prior Health and Safety Code felony conviction; at this time, SB 180 was not in effect. Appellant was sentenced to serve eight years in prison that same date, and his prison sentence was imposed immediately on April 19, 2017.

Nothing in the record before us indicates that Appellant filed a notice of appeal from the Riverside County judgment within the 60-day window thereafter. Thus, the Riverside County judgment became final 60 days later, or on June 18, 2017. (See rule 8.308(a).)

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[5] The reviewing court in *McKenzie* stated that judgment is not rendered in situations where "the trial court initially suspends *imposition* of sentence and grants probation" (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1214, rev.gr.); however, should the defendant "fail[ ] to successfully complete probation and instead violates probation, the trial court may revoke and terminate probation, and then impose sentence in its discretion, thereby rendering judgment. [Citations.]" (*Ibid*.)

Appellant's reliance on *McKenzie* is misplaced. The Riverside County Court imposed Appellant's sentence immediately on April 19, 2017; *McKenzie* involved a situation where imposition of the sentence was suspended and probation was granted, affecting the timing of the judgment. Thus, the unique circumstances that existed in *McKenzie*—which would affect when a judgment becomes final, which in turn would affect whether a defendant is eligible to seek the retroactive benefit of a change in law—are not present in this case.

Appellant's Riverside County judgment was final 60 days after April 19, 2017 and, as such, Appellant is not entitled to the retroactive benefit of SB 180 as it pertains to the Riverside County judgment. The Los Angeles Superior Court simply consolidated the two sentences; the Riverside sentence was replaced by a single aggregate term reflecting the combined sentences as though they were all counts in the same case as required under sections 669 and 1170.1 and rule 4.452. Los Angeles may have become the "sentencing court" for both cases, but its authority was to aggregate the sentences. In no way was the Riverside sentence "revived" and available for modification. It remained final. (*See People v. Phoenix* (2014) 231 Cal.App.4th 1119, 1126 [first sentence was "replaced" when the court combined the first and second sentences from the two separate cases into one aggregate sentence].) The sentence imposed on April 19, 2017 per the Riverside County judgment became final 60 days later (as Appellant did not file any notice of appeal); he therefore cannot benefit from the retroactive application of SB 180, which was not in effect until January 1 of the following year.

C. THE ABSTRACT OF JUDGMENT SHOULD BE CORRECTED TO REFLECT CUSTODY CREDITS EARNED BY APPELLANT.

Appellant finally argues—and the People concede—that the trial court erred when it did not calculate and include in the abstract of judgment the presentence custody credits for both the Los Angeles County case and Riverside County case. During the sentencing hearing, the trial court stated that Appellant is "to get zero credits because he's currently a sentenced prisoner."

Section 2900.5, subdivision (a), provides in pertinent part: "In all felony . . . convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, . . . [or] prison, . . . all days of custody of the defendant, . . . shall be credited upon his or her term of imprisonment . . . ." Section 2900.5, subdivision (d), provides in pertinent part: "It is the duty of the court imposing the sentence to determine . . . the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213." When a court pronounces a single aggregate term and imposes the combined sentence under sections 669 and 1170.1 and rule 4.452, it is the court's "*duty as the new sentencing court to calculate and award all of defendant's credits*, including those pertaining to the [prior] County case." (*People v. Phoenix*, *supra*, 231 Cal.App.4th at p. 1126, italics added.)

Here, the trial court erred by failing to calculate and include in the abstract of judgment the days of presentence custody credit for Appellant for both the Los Angeles County case and Riverside County case. (*People v. Phoenix*, *supra*, 231 Cal.App.4th at p. 1126.) It is true that once a defendant begins serving a sentence in one case, no further presentence credits are to be awarded in any other case, even when the sentences are imposed concurrently. But this does not absolve the trial court of the responsibility to determine whether the defendant is entitled to credit in each of the multiple cases and ensuring they are reflected on the abstract of judgment. In making this sometimes complicated analysis, the court should be guided by the general rule set out in *People v. Bruner* (1995) 9 Cal.4th 1178, 1193–1194.

(See also Couzens, et al., Cal. Practice Guide: Sentencing California Crimes (The Rutter Group 2018) ¶ 15:12.)

We therefore remand with directions to the trial court to calculate Appellant's custody credits for both cases and amend the abstract of judgment to reflect same.

DISPOSITION

The matter is reversed and remanded for resentencing, with directions to: 1) impose a single aggregate term in accordance with section 1170.1, subdivision (a), and calculate custody credits from both the Los Angeles County and Riverside County cases; and 2) prepare an amended abstract of judgment consistent with the above-explained corrections and/or modifications.

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STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.